Supreme Court, U.S.
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No. 79-2033

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CAROL C. WOODWARD, AS ADMINISTRATOR OF THE ESTATE OF CHARLES C. WOODWARD, DECEASED, AND CAROL C. WOODWARD, INDIVIDUALLY,

*Appellant,*

*vs.*

BURNHAM CITY HOSPITAL, A CORPORATION, AND GEORGE GREEN AND STAN J. BOBOWSKI,

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

# REPLY TO MOTIONS TO DISMISS OR AFFIRM

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## CITATIONS


| Cases | Page |
|---|---|
| *Herb* v. *Pitcairn*, 324 U.S. 117 (1945) | 2 |
| *New Orleans* v. *Dukes*, 427 U.S. 297 (1976) | 3 |

**Laws**

| | |
|---|---|
| Ill. Rev. Stat. 1976 Supp. ch.83, Sec.22.1 | 1, 3 |

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# REPLY TO MOTIONS TO DISMISS OR AFFIRM

Appellant is constrained to respond briefly to several contentions made by the Appellees and Amicus Curiae in their Motions to Dismiss or Affirm.

## I.

Appellees' suggestion that the Illinois Supreme Court decision appealed from is based solely on the non-federal

ground of special legislation is clearly erroneous. Appellees conveniently ignore that once the Illinois Supreme Court upheld section 22.1 of the Illinois Limitations Act against a state constitutional challenge, it had to reach and deal with—*as it in fact expressly did*—the challenge to that statute based on the Fourteenth Amendment.

The Illinois Supreme Court's decision on the Fourteenth Amendment issues was necessary to its decision on the merits. Only if the Illinois Supreme Court had first held the Illinois statute *invalid* under the Illinois Constitution and had then gone on to conclude that the statute was *also invalid* under the Fourteenth Amendment would its decision be based on an independent non-federal ground. Indeed, those circumstances would present a classic case of an independent state ground.

But that is not what happened here. In the present case, that portion of the Illinois Supreme Court's decision upholding the Illinois Limitations Act against a Fourteenth Amendment challenge was an indispensable part of that Court's decision. There was no way for the Illinois Supreme Court to avoid confronting Appellant's properly raised Fourteenth Amendment challenge after it upheld the validity of the statute on state constitutional grounds.

Also significant in this regard is that a decision by this Court holding the Illinois statute invalid on Fourteenth Amendment grounds would *change the result.* As Justice Jackson stated in *Herb* v. *Pitcairn,* 324 U.S. 117 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [T]he reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our

> power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and *if the same judgment would be rendered by the state court after we corrected its views of federal laws,* our review could amount to nothing more than an advisory opinion. (Emphasis added)

Very clearly, therefore, the Illinois Supreme Court's decision does not rest on an independent state ground.

## II.

Little need be said about Appellees' reliance on *New Orleans* v. *Dukes,* 427 U.S. 297 (1976) for the proposition that the traditional and "non-interventionist" equal protection test is applicable here, except to note what is obvious. Unlike the present case, *Dukes* is an *economic regulation* case. In such cases, this Court has for over four decades used a traditional equal protection test. But *Dukes* does not and has not undercut this Court's continuing use in appropriate cases of an intermediate standard of equal protection review, of strict scrutiny equal protection review, and of non-deferential due process review.

Appellant submits, as set out in her Jurisdictional Statement, that this case is one to which these other equal protection and due process tests must be applied.

## III.

Appellant finally emphasizes that this case does not, contrary to Appellees' characterization, deal with a typical statute of limitations. Rather, section 22.1 of the Illinois Limitations Act *destroys* medical malpractice causes of action before they can be discovered by injured patients and carves out a privileged class of physicians and hospitals unlike all

other providers of health care and manufacturers and suppliers of medical equipment and pharmaceuticals. Under this statute physicians and hospitals are immunized from suit where their negligence goes undetected for four years, but not the manufacturer of the defective medical instrument used, the manufacturer of the harm causing drug, or the nurse or x-ray laboratory technician who used it. Likewise, the physician-anesthetist is beyond reach of suit, but the nurse-anesthetist is not. The physician-surgeon can hide behind the statute, but a dentist-surgeon cannot. This, we submit, is a statutory scheme different in kind from a statute of limitations, and is clearly in violation of the equal protection and due process clauses of the Fourteenth Amendment.

## CONCLUSION

Appellant asks that Appellees' Motions to Dismiss or Affirm be denied and that probable jurisdiction be noted.

Respectfully submitted,

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